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State Taxation of Foreign Source Corporate Dividends: Another Conquest of the Expanded Unitary Business Doctrine

STATE TAXATION OF FOREIGN SOURCE CORPORATE DIVIDENDS: ANOTHER CONQUEST OF THE EXPANDED UNITARY BUSINESS DOCTRINE

States enjoy great latitude in their income taxation of multistate and multinational businesses[1] because of congressional inaction[2] and Supreme Court forbearance.[3] This latitude, however, has contrib-

1. *See, e.g.*, Moorman Mfg. v. Bair, 437 U.S. 267, 278-80 (1978). The Court has interpreted the Constitution to give states wide latitude in their selection of apportionment formulas. This interpretation is based in part on the Court's reluctance to favor one formula over another—a determination that some may consider to be judicial legislation outside the scope of the Court's delegated power. *Id.*

2. J. Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335 (1976). "Congress has plenary power under the commerce clause to regulate state taxation of interstate commerce, however, it has been virtually unexercised." Change did not come about until 1959, after Justice Frankfurter, in his dissenting opinion, pleaded for congressional action. *See* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 470-77 (1959) (Frankfurter, J., dissenting), *infra* note 3, at 476-77. As a result of Justice Frankfurter's plea, and requests from other judges and lobbyists, Congress passed Public Law 86-272, 73 Stat. 555. This law is significant because it was the first legislative response to regulating interstate commerce. Even though 86-272 placed a jurisdictional restriction on state taxation, it was of little importance to the multistate-multinational businesses because it affected only small merchandising businesses. J. Hellerstein, *supra*, at 339.

For a case interpretation of P.L. 86-272, see Smith v. State Tax Comm'n, 241 Or. 50, 403 P.2d 375 (1965); *cf.* Herf Jones v. State Tax Comm'n, 247 Or. 404, 430 P.2d 998 (1967) (This case narrows considerably the application of P.L. 86-272); *see generally* J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION, 339-44 (Cases and Materials 4th ed.); Hartman, *"Solicitation" and "Delivery" under Public Law 86-272: An Unchartered Course*, 29 VAND. L. REV. 353 (1976) (contains a thorough analysis of P.L. 86-272).

3. The Supreme Court's forbearance in the area of state taxation of multistate businesses can be attributed to their philosophy that Congress must develop a solution to the problem. Justice Frankfurter, dissenting, stated:

> A determination of who is to get how much of the common fund can hardly be made wisely and smoothly through the adjudicatory process. In fact, relying on the courts to solve these problems only aggravates the difficulties and retards proper solution.
>
> At best, this Court can only act negatively . . . . We cannot make a detailed inquiry into the incidence of diverse economic burdens . . . . Neither can we

uted to a lack of uniformity among state apportionment formulas.[4] Moreover, constitutional[5] and statutory jurisdictional requirements[6] have compounded the diversity problem. To meet these requirements, states utilize the unitary business concept to tax income of an integrated business only partially located within the state.[7] The concept proceeds on the basic premise that an integrated business as a unit requires contributions from the unit's parts in varying degrees,

> devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law. . . .
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476-77 (1959) (Frankfurter, J., dissenting).

See Corrigan & Dexter, *States' Latitude in Taxing Multistate Businesses*, 11 URB. LAW. 505, 509 (1979) (The Court intends to limit review of lower court decisions involving state's tax matters); Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States*, 32 HARV. L. REV. 634, 670 (1919) (discusses the difficulties and limits placed on Court solution to the state taxing power problems).

4. *See* G. ALTMAN & F. KEESLING, ALLOCATION OF INCOME IN STATE TAXATION (2d ed. 1950); SPECIAL SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE, HOUSE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H.R. REP. No. 1480, 88th Cong., 2d Sess. (1964) (hereinafter cited as WILLIS REPORT) (This report shows the diversity of state positions on taxation of intangible income through allocation and apportionment); J. Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of a Unitary Business*, 21 NAT'L TAX J. 487 (1968) (Hellerstein suggests that the Court's policy will shift to take a more active role in apportionment methods. Note from the discussion, *infra*, that Hellerstein's projected changes never take place); Rudolph, *State Taxation of Interstate Business, the Unitary Business Concept and Affiliated Corporate Groups*, 25 TAX. L. REV. 171 (1970) (includes an excellent case by case analysis of diverse positions taken by different state courts and gives distinctions of formulary apportionment applied to various businesses).

5. The due process clause places two restrictions on a state's taxing income derived from interstate business. A "minimal connection" must exist between those activities being taxed and the taxing state. National Bellas Hess v. Dept. of Rev., 386 U.S. 753, 756 (1967). In addition, a "rational relationship" must exist between the income sought to be taxed and the taxpayer's activities in the taxing state. Norfolk & Western Ry. v. State Tax Comm'n, 390 U.S. 317, 325 (1968).

6. *See* notes 14, 18-19 *infra*.

7. *See* Butler Bros. v. McColgan, 315 U.S. 501, 506-08 (1942) (Income earned in one state can be taxed by apportionment of another state so long as the in-state and out-of-state activities that produced the income are part of one unitary business); *cf.* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272-73 (1978) (a more extensive relationship between the business and the taxing state must be shown before the latter can tax out-of-state income).

so that separate accounting of any part would result in an inaccurate tax base.[8] Accordingly, states use apportionment formulas to determine the percentage of unitary income attributable to their jurisdiction.[9] A major controversy concerning the application of these formulas is the states' treatment of income from intangibles such as dividends.[10] The Supreme Court in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*[11] held that the corporation's "foreign source"[12] dividend income contributed to its integrated petroleum industry and allowed Vermont to include that income in calculating the corporation's state income tax.[13]

8. *See, e.g.*, Boren, *Separate Accounting in California and Uniformity in Apportioning Corporate Income*, 18 U.C.L.A. L. REV. 478, 532 (1971) (This author defines unitary business as one in which all parts contribute to total profits in unmeasurable amounts. To separate the profits of any portion of a unitary business from the rest would leave a tax base which is inaccurate because no way exists to determine with certainty the profits of any segment).

9. Apportionment of business income can be utilized by either separate accounting or formulary apportionment. Each has a different effect. Separate accounting only computes an assessment on the business within the state. Formulary apportionment computes the percentage of the business activity in the state as it relates to a proportion of the whole unitary business. A single factor sales formula would compute a corporation's taxable income much differently. For example: *A*, a corporation, conducts a unitary business in which five states have retail stores. Each state operation sells 20% of the total goods for sale. *A* realizes a profit of $1,000,000 on total sales. For internal management reasons, the businesses in states *X* and *Y* produced deficits while the other three states earned the cumulative income. The business in state *X*, utilizing separate accounting, shows no profit, and hence, no taxable income. The business in state *Y*, utilizing a single factor formulary apportionment, realized $200,000 in taxable income. (*X's* computation: 20% of 0 = 0; *Y's* computation: 20% of $1,000,000 = $200,000). Note the difficulties, given the facts above, if the other three businesses are required to use formulary apportionment by their states: only 80% of the total income will be assessed, leaving an inequitable benefit to the state. Note also, the problem of over-taxation if the other three businesses are required by their states to apply separate accounting principles: 120% of the income will be taxed.

10. For an analysis of the many alternative methods to taxation of intangibles and a conclusion that full apportionment is the best method, *see, e.g.*, Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401, 408-11 (1970). *See generally* J. Hellerstein, *The Unitary Business Principle and Multicorporate Enterprises: An Examination of the Major Controversies*, 28 TAX. EXEC. 313 (1975). With nearly $3 billion dollars in annual dividend income to multinational businesses, the states find this source to be an attractive revenue area. *See* Carlson, *State Taxation of Corporate Income from Foreign Sources*, ESSAYS IN INT. TAX. 284-301 (1976).

11. 445 U.S. 425 (1980).

12. *See* note 26 *infra*.

13. 445 U.S. at 442-46.

Vermont tax law apportions corporate net income "derived from any trade, business or activity conducted within and without"[14] Vermont. Mobil, a multinational corporation domiciled in New York, only sold petroleum products in Vermont wholesale and retail outlets.[15] In its Vermont tax return, Mobil excluded "foreign source"

14. VT. STAT. ANN. tit. 32 § 5833(a). Net income is defined:

> for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states.

Id. at § 5811(18).

Note, the Vermont statute makes no distinction for types of income. The inclusion of dividend income is left to interpretation. To the extent a corporation petitions or the commissioner requires modification under § 5833(b), dividend income may be excluded or included in the state's apportionment formula to produce an equitable result.

Vermont's three-part apportionment formula provides:

> if the income of a taxable corporation is derived from any trade business or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors: (1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and (B) at the end of the taxable year, expressed as a percentage of all such property both within and without this state; (2) The total wages, salaries and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state; (3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges whether within or without this state.
>
> If a corporation's net income has been determined as not fairly apportioned, the State's tax commissioner is directed to absolve the problem through modification. The pertinent statute provides in part: if the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the commission may require, with respect to all or any part of the corporation's business activity, if reasonable: (1) Separate accounting; (2) The exclusion or modification of either or both of the factors; (3) The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; (4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income.

Id. at § 5833(a)(b).

15. The domestically incorporated affiliates and subsidiaries account for approximately 10% of Mobil's total dividend income. Mobil owns less than 10% of most domestic subsidiaries. 445 U.S. at 457 n.10 (Stevens, J., dissenting). None of appellant's subsidiaries or affiliates conduct business in Vermont, and appellant's share-

dividend income.[16] Disregarding Mobil's protest, the tax commissioner required inclusion.[17] In response, Mobil filed suit attacking the tax as violative of due process[18] and commerce clause restrictions on multiple taxation.[19]

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holdings in those corporations are controlled and managed in New York City. *Id.* at 428-29 & n.12.

Additionally, Mobil's activities in Vermont are confined to wholesale and retail marketing of petroleum and related products. Mobil has no gas productivity or refineries within the State. For a comprehensive example of Mobil's business activity in Vermont, see 445 U.S. at appendix (A32, A46 and A60). For a summary, see *id.* at 458 n.12.

Much of Mobil's business abroad is conducted by wholly and partly owned subsidiaries and affiliates. It is important to note that 90% of Mobil's dividend income was received from four subsidiaries incorporated abroad. Three of them, (Mobil Marine Transportation, Ltd.; Mobil Oil Iraq with Limited Liability; and Pegasus Overseas Limited), are wholly owned and one (ARAMCO) which produces the largest percentage of dividends attributes only 10% ownership to Mobil. *Id.* at appendix (Exhibit 8, Appellant's Source of Dividend Income Schedule).

16. *Id.* at 430; *see* 445 U.S. at appendix (Exhibit 1-3, Vermont Income Tax Return for 1970-72). Mobil argued that the inclusion of the dividend income in the tax base is inconsistent with the statute since the result would not be "fair" and "equitable" as required by the Vermont statute. *Id.* at 432.

17. *Id.* at 432-33. Vermont's tax commissioner restored the "nonapportionable" items to the preapportionment tax base and recalculated Mobil's liability to be $76,418.77. *Id.* at 432.

18. 445 U.S. at 436. Mobil contended that Vermont apportionment violated due process because there was an insufficient nexus between their activities in the state and the foreign activities that produced the dividends. *Id.* "Nexus" is used synonomously with "minimal connection" and "vital link". There must be sufficient activity in a state to meet the jurisdictional "nexus" requirement. International Shoe v. Wash., 326 U.S. 310, 320 (1945).

19. 445 U.S. at 436. Mobil alleged that the tax imposed a burden on interstate commerce by subjecting Mobil's dividend income to a risk of multiple taxation. Since New York, the state of commercial domicile, has the power to tax dividend income without apportionment, allowing Vermont also to tax the income creates a substantial risk of double taxation. *Id.* It is unclear from past cases whether the burden of proof is satisfied by the plaintiff's showing a substantial risk exists or whether actual multiple taxation must be shown. *See* Standard Pressed Steel v. Dept. of Rev. of Wash., 419 U.S. 560, 563 (1975) (a gross receipts tax on a business was upheld by the Court because the taxpayer failed to show a risk of multiple taxation); *cf.* Northwestern States Portland Cement Co., v. Minnesota, 358 U.S. 450, 463 (1959) (the Court indicates that the taxpayer must show that a burden on interstate commerce exists). The Court rejected the commerce clause challenge. Although conceding the possibility of multiple taxation existed, the Court maintained that no burden on interstate commerce existed because New York did not tax the dividend income. 445 U.S. at 442.

Mobil also contended that the Vermont tax violated the Interstate and Foreign Commerce clauses of the Constitution and that Vermont allocation rules created a risk of multiple taxation of the same income. *Id.* Furthermore, Mobil suggests that

Ignoring Mobil's substantive due process challenge, the Supreme Court held on procedural grounds that Mobil failed to meet its burden of proving that Vermont's tax was extraterritorial.[20] In reaching its decision, the Court recognized the inherent complexities in the multinational corporate structure and the consequential difficulty

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only the state of commercial domicile or the State of the "business situs" should be allowed to tax foreign source dividends under recent case precedent. *Id.* at 444. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

The National Tax Association in 1922 developed the traditional approach to taxation of dividend income by the state of commercial domicile. Its report stated: "[Dividends] form no part of the trading profit and do not need to be apportioned by formula since they can readily be specifically allocated to their proper sources." *Report of Nat'l Tax Ass'n Comm. on Apportionment Between States of Taxes on Mercantile and Manufacturing Business, Proceedings*, 15 N.T.A. 198 (1922). For an example of a case supporting this approach see Wheeling Steel Corp. v. Fox, 298 U.S. 193, 208-10 (1936).

The Supreme Court, in dicta, strongly departed from the traditional approach of allocating foreign dividends to the state of commercial domicile and moved toward a position allowing apportionment as well. 445 U.S. at 445.

> We find no adequate justification, however, for such a preference. Although a fictionalized situs for intangible property sometimes has been invoked to avoid multiple taxation of ownership, there is nothing talismanic about the concepts of 'business situs' or 'commercial domicile' that automatically renders those concepts applicable when taxation of income from intangibles is at issue. The Court has observed that the maxim *mobilia sequunter personam*, upon which these fictions of situs are based, 'states a rule without disclosing the reasons for it.'
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> First Bank Stock Corp. v. Minn., 301 U.S. 234, 241 (1937). The Court also has recognized that 'the reason for a single place of taxation no longer obtains' when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. Curry v. McCanless, 307 U.S. 357, 367, 59 S. Ct. 900, 906, 83 L.Ed. 1339 (1939).

Id.

Some cases indicate that the traditional approach of allocation of dividend income to the state of commercial domicile exclusively has been abandoned. *See, e.g.*, Standard Oil v. Peck, 342 U.S. 382, 384 (1952). For support of an equally strong contrary position, see generally Hellerstein, *supra* note 10.

20. 100 S. Ct. at 1234. Mobil attempted to meet its burden by showing that its foreign activities were separate and distinct from its petroleum industry. Such a showing would have contradicted the allegation that Mobil's foreign source income was unitary and hence not apportionable by states that had minimum contacts only with the integrated petroleum industry. The Court determined that transforming the same dividend income into legally separate entities, foreign or otherwise, does not change the economic realities of unitary business and therefore should not affect the apportionability of income the parent receives. *Id.* at 441.

See also Norfolk & Western Ry. v. North Carolina, 297 U.S. 682, 688 (1968) (Where a taxpayer attacks an apportionment formula, he carries the distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed).

states have in establishing jurisdiction over a fair proportion of taxable income earned by the corporation.[21] Accordingly, it adopted the concept that "the linchpin of apportionability in the field of state income taxation is the unitary business principle."[22] Emphasizing that Mobil's foreign investment dividends contributed to its integrated petroleum industry,[23] the Court upheld the tax commissioner's inclusion of the dividends in Vermont's apportionment formula.[24]

Initially, the due process clause prohibited states from taxing income arising from business conducted outside the state.[25] The unitary business concept arose from the necessity for states to meet jurisdictional requirements conditioning taxation of income from business activities extending beyond their respective borders.[26] The

21. 445 U.S. at 438.

22. *Id.* at 439. In the Court's discussion of the correct method of assessment to use in determining the income of a unitary business, they note:

> separate accounting, while it purports to isolate portions of income received in various states, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable source.

Id. at 438. *Contra* Garrison, *Toward a Consensus on Apportionable vs. Allocable Income*, 28 TAX EXEC. 41, 60-61 (1975) (Presents a list of many strong policy arguments which militate against apportionment of dividend income by formulary apportionment. Some of the arguments include: overtaxation results when the state of commercial domicile requires allocation while other states require full apportionment; dividend income has very little nexus with a non-domiciliary state in which only sales are conducted; courts have recognized in many cases that the state of commercial domicile has power to tax corporate dividend income).

23. The oil and gas industry is made up of non-integrated and integrated companies. The two differ because non-integrated companies engage only in production and sell their crude oil at the wellhead while integrated oil companies engage in production, refining and marketing. *See* Rudolph, *supra* note 4 at 187.

24. 445 U.S. at 442.

25. The due process clause of the fourteenth amendment prevents states from taxing a person outside their jurisdiction as well as a person or business which has an insufficient relationship to the state. *See* International Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 352-57 (1944).

26. The origin of the unitary business concept can be traced back to early railroad cases involving "rolling stock". A businessman in Pennsylvania owned several railroad cars that were contracted for use. Pennsylvania imposed a tax on the percentage of income attributable to the state by determining the ratio of miles traveled in the state to those traveled outside. This assessment was known as the "unit rule" since the entire ownership of rolling stock was included. Pullman's Palace Car v. Pennsylvania, 141 U.S. 18 (1891). Thus it was the Court's recognition of the use of business property for a single purpose that gave rise to the "unit" classification.

first major application of formulary apportionment to net income of an integrated business occurred in *Underwood Typewriter v. Chamberlain*.[27] In *Underwood*, Connecticut taxed a corporation that earned income through a "series of transactions" beginning with manufacturing in the state and ending with sales outside.[28] The Court recognized the difficulty in determining a state's fair proportion of taxable income by looking only to instate manufacturing operations.[29] Consequently, the Court allowed apportionment of the integrated business income.[30] The Court implied that even though apportionment is a rough approximation, its purpose is to attribute a fair proportion of profits to the taxing state.[31] Additionally, the Court held that the method of apportionment will be valid unless the facts show that the formula is inherently arbitrary, or that its application produces an unreasonable result.[32]

Bass Ratcliff v. State Tax Commissioner[33] extended the *Underwood* rationale by allowing inclusion of "foreign source"[34] income into the

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27. 254 U.S. 113 (1920).

28. *Id.* at 120-21.

29. *Id.*

30. *Id.* Connecticut employed a single factor formula using property as a basis. The Court computed the proportion of value of instate real and tangible personal property to value of out-of-state property owned by the corporation to determine the fair share of income attributable to the state. This method was appropriate in these circumstances since the product was manufactured in Connecticut and sold out-of-state. *Id.*

31. *Id.* at 119-21. The Court's attitude on this issue remains unchanged today. *See, e.g.*, Moorman Mfg. v. Bair, 437 U.S. 267, 278-80 (1978) (The apportionment formulas are not applied to identify any income from specific sources, rather, they are to be used as a rough approximation of income attributable to the taxing jurisdiction).

32. 254 U.S. at 118-19. The facts show that profits amounted to $1,336,586. The fair cash value of real estate and tangible personal property in Connecticut was $2,977,827 and the fair cash value of the property outside the state was $3,343,155. The proportion of instate to out-of-state property was 47%. Even though the taxpayer showed that 3% of the income was attributable to Connecticut, the Court allowed the apportionment since the business was a unit. This case shows that it takes more than an indication of unreasonableness to invalidate a formula. *Id.* *Cf.* Maxwell v. Kent-Coffey Mfg., 204 N.C. 365, 168 S.E. 397 (1933); Annot., 90 A.L.R. 476 (1933) (North Carolina applied a single-factor apportionment formula to a Delaware corporation doing business in the state. The Court upheld the formula which taxed 99.2% of the corporation's entire income because 99.2% of the businesses' property was in the state. The result, however, is extremely arbitrary because only .002% of the business sales were attributable to North Carolina).

33. 266 U.S. 271 (1924).

34. In this context, foreign source refers to income produced outside the United

apportionment formula base.[35] In *Bass*, a British corporation brewed ale in England but sold it in New York.[36] Because the profits depended on each part of the "series of transactions," the Court concluded the business was unitary.[37] Consequently, New York could properly tax a fair proportion of the profit.[38] In *Bass*, the formula ratio has independent significance because it includes in the denominator all property factors that contribute to producing both the tangible income as well as the intangible dividend income.[39] Otherwise, the presence of the dividend income in the numerator without its corresponding property factor in the denominator would have had the inequitable effect of taxing gross dividend income.[40] *Bass*, coupled with *Underwood*, indicates a trend that state formulary apportionment will prevail when applied to unitary businesses.

Hans Rees' Sons v. North Carolina,[41] the first case in which a taxpayer successfully contested a state apportionment formula,[42] de-

States. The income may be either tangible, in the form of real and personal property, or intangible, in the form of capital gains, rents, and dividends.

The WILLIS REPORT, *supra* note 4, at 1148-50, recommends that foreign source income should not be taxed by federal or state governments, unless a corporation doing business in the taxing state also has income from foreign sources. This report also recommends that the assessment be made by apportionment. Id. at 1144.

35. 266 U.S. at 282.

36. *Id.* at 278-79.

37. *Id.* This is the first time the unitary business doctrine is used. Although the term is not used in *Underwood*, it is apparent from the similar rationales used by the courts that the business in *Underwood* was also unitary. In fact, the Court sustained the tax in *Bass*, only after they cited *Underwood* for support. *Id.*

38. *Id.* at 278-80. Despite the fact that separate accounting indicated a loss in New York, the Court held that to get the "true value" of income, from a unitary business, apportionment must be allowed. *Id.*

39. *Id.* at 277-80.

40. The justification for inclusion of the foreign property in the tax base of the apportionment formula is evident. By including the income without the factors that produced the income in the tax formula, the effect is taxation of gross profits of the business by a net profit standard. *Compare* the WILLIS REPORT, *supra* note 4, at 1155 (does not require inclusion of the foreign factors in the states' apportionment formulas. The reason for not requiring the inclusion may be attributable to the feeling that because states can modify their apportionment formulas, they will naturally do so to produce an equitable result), *with* I.R.C. § 243, (the federal government allows foreign tax credits to offset its inclusion of foreign source income into the federal income tax base).

41. 283 U.S. 123 (1931).

42. In the history of Supreme Court decisions, taxpayers have not had great success in contesting state apportionment formulas. Some of the successful cases are

parted from this trend. The Court conceded that, under the unitary doctrine, the amount of income attributable to each state should depend on the extent of business activities in that state.[43] Since the taxpayer proved by strong evidence that the apportionment formula produced an unreasonable result,[44] the Court invalidated the formula and allowed a separate accounting of the income produced in the state.[45]

Butler Brothers v. McColgan,[46] though inconsistent with *Hans Rees' Sons*, neither overruled nor qualified it. The *Butler Brothers* Court determined that once a business has been classified as unitary, a taxpayer may not contest the reasonableness of a particular apportionment formula by separate accounting.[47] For the first time, however, the Supreme Court adopted a test to determine if a business is unitary.[48] The Court used a three factor test: unity of ownership, unity

Colonial Pipeline v. Traigle 421 U.S. 100 (1975); Standard Pressed Steel Co. v. Dept. of Rev. of Wash., 419 U.S. 560 (1975); Norfolk & West. Ry. v. North Carolina, 297 U.S. 436 (1964); Memphis Gas v. Stone, 335 U.S. 80 (1948); Hans Rees' v. North Carolina, 283 U.S. 123 (1931). This result is probably attributable to the taxpayer's difficult burden of proof. *See* notes 20 and 32 *supra*.

43. 283 U.S. at 134. The Court determined that, as a matter of Constitutional law, a state cannot tax income which is "in no just sense attributable to transactions within its jurisdiction." *Id.*

Due process requires that a state have more than a jurisdictional nexus with the business; an additional requirement is that there must be a rational relationship between the state and the activity taxed. Miller Bros. v. Maryland, 347 U.S. 340 (1954); *see also* note 5 *supra*.

44. 283 U.S. at 135. Evidence introduced indicated that 17% of the average income had its source within North Carolina and the state's assessment allocated 85% of the income. *Id. Cf.* note 32 *supra* (more than an indication of unreasonableness is needed to invalidate a formula.)

45. 283 U.S. at 135.

46. 315 U.S. 501 (1942).

47. *Id.* at 508-09. The taxpayer's proposed separate accounting for their California branch. Under this method, no tax would have been assessed since the calculations would indicate a loss. Under California's formulary apportionment, however, California would receive 8% of the corporation's nationwide income. *Id.*

48. *Id.* The California Supreme Court established the test. Butler Bros. v. McColgan, 17 Cal. 2d 664, 111 P.2d 334 (1941), *aff'd*, 315 U.S. 501 (1942). California applied a three factor apportionment formula utilizing property, sales, and payroll. The Court recognized these factors show "the relative contribution of the activities in the various states to the production of the total unitary income." *Id.* at 508. This three factor formula is the most common today and is known as the *Massachusetts Formula*. For a description of the formula, *see, e.g., Developments in the Law, Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 1011 (1962).

of operation, and use of a centralized executive force.[49] In *Butler Brothers*, seven mercantile business entities located in seven states conducted their business exclusively within each state.[50] The Court considered them unitary because each entity contributed financially to the maintenance of a "centralized management" division that provided sales advantages for each of the separate entities.[51] Nevertheless, after *Butler Brothers*, the Supreme Court left the states unguided in developing the unitary business concept from the single test established.[52] Following the contradicting interpretations in *Hans Rees' Sons* and *Butler Brothers*, it remained unclear when to consider a business unitary and apply apportionment, and when instead to allow separate accounting.

States have manipulated the unitary business doctrine and modified taxing methods to serve their individual revenue needs.[53] Consequently, wide diversity in the division of taxes has created risks of

49. 315 U.S. at 508-09. The three unities test was applied in other cases. *See, e.g.*, John Deere v. Franchise Tax Board, 38 Cal. 2d 214, 229, 238 P.2d 569, 577 (1951). Many commentators criticize the three unities test because of its inherent ambiguities. The factors of the test give no significance to the difference between a business conducted instate and one conducted out-of-state. *See, e.g.*, Keesling & Warren, *The Unitary Concept in the Allocation of Income*, 12 HAST. L.J. 42, 45-48 (1960).

50. 315 U.S. at 504-505.

51. The business entity located in California, showed a loss on its income tax return, computed by separate accounting. The California business, along with the other six, sent payments to Chicago for maintaining a central management division which handled management of the sales. It has been argued that in cases such as these, involving mercantile operations, separate accounting would be a more feasible assessment. *Rudolph, supra* note 4, at 182; *cf. Developments in the Law-Federal Limitations on State Taxation of Interstate Business, supra* note 48 at 1015 (the note indicates this was a proper decision. Even though one entity may have to operate at a loss, the other profiting entities have received the economic benefit of bulk purchases, contributed to in part from the losing entities joint purchase. Additionally, elements such as goodwill and efficiency received from centralized management cannot be accurately determined through separate accounting).

Butler was a major extention of the unitary business principle as previously established. *Bass* and *Underwood* derive their unity only from operational interdependence through a "series of transactions", while *Butler* derives its unity from economic interdependence of the centralized management.

52. *See* Boren, *supra* note 8, at 490-94 (discusses the development of the three unities test along with some modifications made by the California courts. The "dependency test" was added in Edison Cal. Stores v. McColgan, 30 Cal. 2d 472, 183 P.2d 16 (1947). The "necessary and essential" test was added in Superior Oil Co. v. Franchise Tax Board, 60 Cal. 2d 406, 386 P.2d 33, 34 Cal. Rpt. 545 (1963)).

53. *See* notes 62-65 and accompanying text *infra*.

both multiple taxation[54] and under taxation.[55] Attempts to provide uniform and reasonable methods for allocating and apportioning the income of multistate businesses have had limited success.[56] Accord-

54. With no uniformity among the states, the various taxation methods applied have the potential effect of overlapping, resulting in multiple taxation of the business. There are, theoretically, five basis in which business dividend income can be taxed by states, they include the following: (1) state of legal domicile; (2) state of commercial domicile; (3) state in which stock is located; (4) all states the business receives income from (by apportionment); (5) all states which have conferred benefits on the business. Therefore, if states exercised each basis of taxation, the same business dividend income could be taxed five times. One argument employed by taxpayers is that the intangible investment income has already been taxed by the payor subsidiary, and to tax it again would indicate multiple taxation and hence, a burden on interstate commerce. Furthermore, the elusive nature of intangibles, result in the difficulty of states to trace the intangible to some "source" within the state. Dexter, *supra* note 10, at 402, 403 and 404.

55. Several reasons support the possibility of undertaxation. Because intangible investments require very little business activity, taxpayers have successfully argued that the business activity in the taxing state is insufficient to overcome existing jurisdictional requirements. *Id.* at 403, 404.

56. Attempting to provide a uniform and reasonable method for allocating and apportioning the income of multistate businesses, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the House of Delegates of the American Bar Association, approved the Uniform Division of Income for State Tax Purposes Act (UDITPA) on July 1, 1957. 7 UNIFORM L. ANN. 365 (1970). For a discussion on the uniform act's basic features by the drafter of the act, see Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 10 (1957). The uniform act deals with the allocation and apportionment of income of multistate businesses. The drafters designed the act for those states that tax net income by calculation formulas. For a text of the uniform act, see 35 TAXES 631 (1957).

Initially, few states adopted the uniform regulations proposed by the UDITPA. In 1959, two years after the UDITPA had been approved by the National Conference of Commissioners on State Laws, Alaska was the only state that had adopted the act. Hartman, *State Taxation of Corporate Income from a Multistate Business*, 12 VAND. L. REV. 21, 58 (1959).

This attitude changed, however, when federal intervention became imminent. Legislative concern for uniformity arose after the Willis Committee completed its study. The WILLIS REPORT found great diversity in state taxation practices. WILLIS REPORT, *supra* note 4, at 1143. The committee's proposal was incorporated into the Interstate Tax Bill. *Interstate Taxation Bill*, H.R. REP. No. 11798, 89th Cong., 2d Sess. (1966). The WILLIS REPORT radically departed from prevailing practices by proposing one of many extreme remedies to state diversity: the full apportionment of all income from multistate businesses. Full apportionment of all income was to replace the various methods of division used by states. Although the Bill failed, the fear it wrought induced formation of the Multistate Tax Compact (MTC), a confederation of twenty-one states created primarily to block enactment of federal legislation on the interstate tax problem.

The MTC's stated purpose is to promote uniformity and compatibility in state tax systems. MTC is composed of one representative from each participating state. They ing to one scholar, the major impediment to success is the mixed sentiment toward uniformity among taxpayers and state tax officials alike; some members of both camps consider the existing diversity advantageous.[57] For example, states have enjoyed greater freedom to tax as a natural result of the lack of uniformity.[58]

States have evaded traditional jurisdictional requirements without violating constitutional protections.[59] Recently, states have expanded the unitary business principle as a means to lift jurisdictional boundaries,[60] further enabling them to tax previously untapped revenue.[61]

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propose advisory regulations concerning intangible property assessments. Participating states have authorized the MTC to conduct joint audits of multinational businesses when participating states request them. For a text of the MTC agreement, see Dexter, *supra* note 9, at 402, 403. The MTC's authority to audit businesses was contested as a violation of the Contract Clause of the Federal Constitution (Art. I § 10). The Supreme Court upheld the MTC's authority. *See* United States Steel v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

States feared that federal intervention would infringe upon state sovereignty and that exclusive application of formulary apportionment to all income would inadequately account for those states with special relationships to businesses. States were particularly concerned with this portion of the Interstate Tax Act that would disregard sales factors in the apportionment. States used many methods to determine receipts included in the numerator of the state's receipt factor. *Hellerstein* lists these methods as follows: "(1) the *sales activity test* which allowed taxation of sales income where the business has sales employees; (2) the *sales office negotiation test*, attributed sales as taxable income to the state where the negotiation transpired; (3) the *origin test* allocated income from sales to the state where the goods were shipped from; (4) the *destination test* which is the most popular, allows receipt of sales to be taxed by the state in which the customer receives the goods." *See* J. HELLERSTEIN & W. HELLERSTEIN, *supra* note 3, at 459.

57. Boren, *Specific Allocation of Corporate Income in California: Some Problems in the Uniform Division of Income for Tax Purposes*, 30 TAX. L. REV. 607 (1975) (presents a thorough analysis of the problems of the UDITPA, and offers some solutions. One problem is the conflicting interpretation of the act by taxing authorities).

58. *See, e.g.*, Honolulu Oil v. Franchise Tax Board, 60 Cal. 2d 417, 386 P.2d 40, 34 Cal. Rpt. 552 (1963) (States wanting to maximize their revenues have disregarded traditional UDITPA requirements and allowed the taxation of income arising from nonoperational activities).

59. *See* notes 18-19 *supra*.

60. *See* Superior Oil v. Franchise Tax Bd., 60 Cal. 2d 406, 386 P.2d 33, 34 Cal. Rpt. 545 (1963) (expanded unitary business principle to include non-operational functions of a non-integrated business). *Contra* Skelly Oil v. Comm'n of Taxes, 269 Minn. 351, 131 N.W.2d 632 (1964) (an integrated oil company carrying on operating functions in a state was held to be nonunitary).

Commentators argue that these cases present two extremes in defining the contours of the unitary business principle. J. Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business*, 21 NAT. TAX. J. 487, 497-503 (1968).

An example of this expansion occurred in *Woolwort v. Director of Taxes*,[62] in which the New Jersey Supreme Court allowed the state to include in its tax base foreign source dividend income from a non-domiciliary corporation.[63] The court held that no federal constitutional barrier to state taxation of foreign source dividend income existed if the business was unitary.[64] The court emphasized that the Woolworth subsidiaries were "wholly owned" and carried on the "same business in the same way" as the parent corporation.[65]

In *Mobil*, the Court indicated that because the appellant multinational corporation maintains an integrated petroleum industry,[66] all of its subsidiaries and investments are naturally a part of and contribute to the unitary business.[67] The *Mobil* Court, like the New Jersey

61. *See* note 19 *supra*.

62. 45 N.J. 466, 213 A.2d 1 (1965). Other examples of this expansion have also been recognized. *See, e.g.*, Gulf Oil v. Morrison, 120 Vt. 324, 141 A.2d 671 (1958) (the court held that dividend income was subject to apportionment as either business income or as part of the unitary income of the payee corporation).

63. 45 N.J. at 500, 213 A.2d at 20.

64. 45 N.J. at 494, 213 A.2d at 16-17.

65. *Id.* at 482-86, 213 A.2d at 10-12. Woolworth's multinational business includes approximately 3,500 stores in the United States and foreign countries. All of the businesses were retail merchandise stores. The *Woolworth* Court emphasized unity of business activity as much as unity of ownership.

Woolworth, like *Bass*, accounted for foreign investments in the denominator of the formula. Woolworth sought to exclude the investment income dividends and interest, from the income tax base applied by New Jersey. The court recognized the formula as being a distortion of the true income realized. The income and value of the investments were included in the numerator of the apportionment formula but the out-of-state property, payroll and receipts that created these values, were not in the apportionment factors. Accordingly, the court remanded the case for proper amendments. The court recommended that the director of taxation should have used his discretionary authority to grant relief under the inadequate statute which provided the formula. *Id.* at 491, 213 A.2d at 15.

66. Courts have recognized that integrated petroleum industries, because of their large size and concentration of goals toward production, refining, and sales, appear on their face to be unitary. The industry, however, has often segregated its income at the production end from sales because posted field prices for crude oil allow for maximizing profits. *See generally*, Magnolia Petroleum v. Oklahoma, Tax Comm'n, 190 Okla. 172, 121 P.2d 1008 (1942).

67. Contrary to the Court's holding that Mobil's investment income along with its operational income is all part of a unitary business, Mobil argues and supports with facts that its investments are "separate". 445 U.S. at 440. *See, e.g.*, Keesling and Warren, *The Unitary Concept in the Allocation of Income*, 12 HASTINGS L.J. 42, 43-48 (1960) (Distinguishes "separate" from "unitary" business. A separate business is one conducted wholly within a particular taxing jurisdiction that utilizes separate accounting only to take into account income from property within the borders. A uni-

Supreme Court, expanded the unitary business doctrine to overcome jurisdictional barriers on state taxation. Mobil's foreign source dividend income serves as investment income rather than operational income.[68] Even though Vermont's connection with Mobil arose from Mobil's operations, the investment income was included in Vermont's net income assessment.[69] Consequently, the *Mobil* Court's holding establishes a new rule. The constitutionally required minimal connection for taxation purposes[70] now need only exist between the state and the unitary business generally.[71] Moreover, the state no longer must show a "rational relationship" between the income taxed and the purported instate activity.[72]

Having established jurisdiction, the Court followed the *Underwood* rationale by allowing apportionment despite its recognized imprecision.[73] By virtue of its holding, the Court acknowledged the near impossibility of achieving an accurate apportionment for complex multinational businesses.[74] Vermont law requires, however, that

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tary business has inseparable portions of its business that is carried on within and without the taxing jurisdiction. The necessity of dealing with the business as a unit by taking into account income from property and activities outside of the jurisdiction as well as within gives rise to its classification. The multistate business is able to change from separate to unitary with no apparent change in the nature of the business. These commentators also suggest that the foregoing analysis of the distinction between separate and unitary businesses differs sharply from much of the previous thinking on the subject. *Id.*

68. 445 U.S. at 435-36, 455-57 (Stevens, J., dissenting). One of the most substantial controversies in state taxation of dividends concerns how dividends are produced in the course of business activity. For example, if a manufacturing company receives dividends from a wholly owned subsidiary engaged in selling the product of the parent corporation, the dividends would be realized as operating income from the unitary business. If the affiliate were not an integral part of the unitary enterprise, a different result should prevail. Such income, as an investment, does not flow from the operating activities of the unitary business. Hence, the traditional rule under the UDITPA that income from intangibles not realized in the course of business operations should be allocated to the domiciliary is undoubtedly sound and should take precedent. *See generally* J. Hellerstein, *supra* note 10. *See also*, Pierce, *supra* note 56.

69. 445 U.S. at 435-36, 455-57 (Stevens, J., dissenting).

70. *See* note 5 *supra*.

71. *See* notes 5 and 18 *supra*.

72. *See* note 43 *supra*. *See also* note 5 *supra*.

73. *See* note 31 *supra*.

74. *Id.* *See also*, International Harvestor Co. v. Evatt, 329 U.S. 416, 422 (1947) (The Supreme Court, "has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities . . . and has declared that 'rough approximation rather than precision' is sufficient.").

even if the unfairness does not reach unconstitutional proportions, the tax commissioner must consider adjustments in the formula to alleviate obvious inequities.[75] To maintain a degree of fairness and equity in determining a proper formula, the tax commissioner should be obliged to research possible adjustments requested by the taxpayer.[76] If the commissioner allows no adjustment, he should present sound reasons supporting this conclusion.

The Supreme Court's analysis of *Mobil* mistakenly begins with the premise that Mobil, its affiliates, and its subsidiaries comprise a unitary business.[77] The Court places minimal consideration on the traditional relationships between business entities that precedent required to establish unity. The Court could have easily reached the conclusion that it did, had it not deemphasized a "series of transac-

75. F.W. Woolworth Co. v. Director of Taxation, 213 A.2d 1, 18, 19 (1965). *See* VT. STAT. ANN. tit. 32 § 5833(b) which provides that "if a corporation's net income has been determined as not fairly apportioned, the State's *tax commissioner is directed to absolve the problem through modification* . . . the corporation may petition for, . . . (4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income. (emphasis added). In Mobil, the taxpayer petitioned for a modification allowed by the Vermont statute. Mobil's petition included a request for a "combined method" of apportionment. 445 U.S. at 459 n.15. The petition was rejected by the commissioner and disregarded by the Court. Commentators suggest that "combined" apportionment could solve the division of dividend income problem. Intercorporate dividends are deducted from taxation while the foreign source investments are included in the denominator of the formula. This will obviously lead to an equitable result because no matter where the dividends are located or what they are used for, after transfer within the corporation to their final destination, the taxing jurisdiction will assess the dividends, provided sales income is included in the base. In effect, the dividend income reaches the taxing state, rather than the taxing state reaching the dividends. Consequently the combination method coupled with full apportionment would provide an equitable result in taxation for both state and business alike. *See generally* Dexter, *supra* note 4, at 420-21.

76. *Id.* Legislatures must necessarily intend that a formula not only be constitutional but also equitable. A recent decision has indicated the importance of fairness in apportionment methods. General Motors v. Dist. of Columbia, 380 U.S. 553, 561 (1965) ("to ensure that the methods used display a modicum of reasonable relation to corporate activities within the state."). *See also* notes 49-51 *supra*.

77. 445 U.S. at 455-57. (Stevens, J., dissenting). Justice Stevens indicates that the majority, under its definition of unitary business, assumes the justification of Vermont's assessment of Mobil's income. The majority's use of the unitary business principle encompasses not only the operations of the taxpayer but also the operations of all affiliates that are directly or indirectly engaged in the petroleum business. Stevens supports his position by indicating, "a large number of the corporations in which Mobil has small minority interests and from which it derived significant dividend income would seem either to be engaged in the petroleum business nor to have any connection whatsoever with Mobil's marketing business in Vermont." *Id.* at 460.

tions",[78] "centralized management",[79] or, as the New Jersey Supreme Court enunciated, "ownership and same business activities as the parent".[80] None of the relationships among Mobil, its affiliates, and its investments appear sufficient to establish unity. The only activity involved was the receipt of dividends, and the only management activity involved was accounting for the dividend income after its receipt.[81] Furthermore, appellant owns less than ten percent of many of the domestic and foreign affiliates from which Mobil received foreign dividend income.[82] Some of these affiliates conduct businesses totally unrelated to the petroleum industry.[83]

The Court imposes a burden of proof virtually impossible to meet. Earlier decisions exemplify this difficulty.[84] Nevertheless, those decisions indicate simplicity of proof compared to that required in *Mobil*. The early businesses were relatively small, employed simple bookkeeping, and applied single factor formulas to tangible property. In contrast, Mobil is an extremely large corporation with intricate bookkeeping, and is required to apply a complex formula[85] to intangible property.[86] The corporation comingles investment income with operational income, and utilizes the combined income for the business generally. At this point, investment income loses its identity of origin and can not be traced.[87] In view of this traditional managerial prac-

78. *See* Bass Ratcliff v. State Tax Comm'n, 266 U.S. 271 (1924); Underwood Typewriter v. Chamberlin, 254 U.S. 113 (1920) (Courts held "series of transactions" established unity).

79. *See* Butler Bros. v. McColgan, 315 U.S. 501 (1942). (Concentrating on the centralized management facts of the "three unities" test, the court looked to the economic interdependency of the business to establish unity.).

80. *See* Woolworth v. Director of Taxes, 45 N.J. 466, 213 A.2d 1 (1965) ("ownership and same business" establish unity).

81. 445 U.S. at 455-57 and 456-57 nn.9 & 10 (Stevens, J., dissenting).

82. *Id.*

83. *Id. See also* note 18 *supra* and 89 *infra* (Stevens, J., dissenting). For a list of Mobil's subsidiaries and affiliates, and a discussion of their unrelated nature, *see* 445 U.S. at 455-57 (Stevens, J., dissenting).

84. *See* notes 32 and 42 and accompanying text *supra*.

85. *See* note 14 *supra*.

86. *See* Montgomery Ward v. Comm'n of Taxation, 276 Minn. 479, 483-84, 151 N.W. 2d 294, 296-97 (1967) (Discusses the extreme difficulty in accounting for intangible property because often it is set aside as a reserve for further expansion, reinvested in its own business or other business. Given the nature of the income, tracing it for taxation purposes is extremely burdensome if not impossible).

87. *See* note 54 *supra*.

tice, a "clear and cogent showing of an arbitrary result" constitutes a nearly impossible burden of proof.

To avoid the "linchpin of apportionability," Mobil would have to keep its investment proceeds separate from the businesses operational funds. A requirement of this nature would unreasonably restrain Mobil's management. After all, the dividends have already been earned through investments and have established an identity as investment income. To simply consider them related to the operation of the integrated business and subject to apportionment because they are subsequently used in business operations stretches the imagination.[88] Only one theory can justify this conclusion: that the purpose of producing any income whatsoever is for use in the business generally. Thus, all income becomes unitary business income regardless of investment or operation.

Unquestionably then, the denominator of the apportionment formula applied must take into account the factors contributing to the realization of "all" the unitary income. Vermont, however, did not include in the denominator of the formula investment factors that produced the dividend income.

Both *Bass* and *Woolworth* have emphasized the importance of this inclusion. Without it, the apportionment formula would greatly overstate Mobil's taxable income in Vermont.[89] Either the Supreme Court should require the Vermont tax commissioner to modify the formula or the tax, or the results should be deemed arbitrary and unlawful under established doctrine.

The Court in *Mobil* made a cursory attempt at solving a comprehensive problem and obviously deferred to congressional action.[90] The Supreme Court could have pursued a more respectable approach by fostering a narrow, workable standard giving state courts and leg-

88. *See* note 67 *supra*.

89. In opposition to the majority decision, Justice Stevens argues that there was no unitary business and even if established, the apportionment formula produced an arbitrary result. Justice Stevens shows that the apportionment formula leads to an arbitrary result: "But of greatest importance, the record contains no information about the payrolls, sales or property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause Mobil's Vermont income to be overstated." 445 U.S. at 460-61 (Stevens, J., dissenting).

90. The Court's traditional "hands off" policy on state taxation results from the Court's philosophy that Congress should resolve any existing problems. *See* notes 2 and 3 *supra*.

islatures a cogent direction for future development of the unitary business doctrine.[91] Instead, the Court expands the doctrine to the derogation of any attempts toward uniformity.[92] As a result, states remain free to exercise great latitude in their income taxation of multistate and multinational businesses.

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91. One approach offered by a respected authority is the utilization of an objective rather than subjective test by requiring degrees of operational interdependence before a business would be considered unitary. This test leaves little room for diversity of application and would result in a more uniform approach. *See* J. Hellerstein, *supra* note 10, at 324; for an example of an additional method, see note 5 *supra*.

92. *See* note 56 *supra*. The expansion of the unitary business doctrine to the extremes reached in Mobil no longer addresses the original purpose for the doctrine's development, to allow states a fair means to establish jurisdiction to tax that which is reasonably attributable to them. States have had a history of diversity in taxation practices caused by an ambiguous test established in *Butler*. Recently, the states have moved toward more uniform guidelines under the UDITPA, only to be suppressed by the Court is nullifying the essential dividend classification. The importance of this classification is explained in note 68 *supra*.